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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1953

No. 189

MICHAEL BATTIATO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

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To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Your Petitioner, Michael Battiato, prays that a Writ of Certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit which was entered in this case between the above named parties on May 22, 1953, affirming the judgment of the United States District Court for the Northern District of Indiana, Hammond Division. The petition for rehearing was denied on June 19, 1953.

The Opinion Below

The Circuit Court of Appeals for the Seventh Circuit affirmed the judgment sentencing the Petitioner to the cus-

tody of the Attorney General for a period of four years on each count of the indictment, to be served concurrently.

The opinion has not yet been reported. It appears in the record at pages 122 to 125.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Question Presented

1. Whether, in a trial where only one witness indentifies a defendant and the defendant denies his accusation, the remarks of the prosecuting attorney intimating personal knowledge of the guilt of the defendant and also stating facts dehors the testimony in evidence at the trial, is prejudicial and reversible error.

Summary Statement of Matter Involved

The Petitioner, Michael Battiato, was indicted with one, John Mundo, in two counts, each of which charged the defendants with knowingly uttering and passing a counterfeit $20 Federal Reserve note on March 17, 1950 (R. 1, 2).

The Petitioner was found guilty after a trial by a jury and was sentenced to be committed to the custody of the Attorney General for a period of four years on each count, to be served concurrently.

Only one witness for the Government, Louis Lobono, Jr., who was a bartender at the G. & S. Tavern in East Chicago, Indiana, on the evening when the said counterfeit bills were uttered and passed, identified the petitioner as one of the men who passed a $20 bill. He served a drink to each of the defendants in the indictment and John Mundo paid for the first drink with a $20 bill. He served a second drink to the said defendants and Battiato paid him with a $20 bill, according to his testimony. This bill didn't look good to

him and he went to the rear of the tavern to look at it (R. 9). When he returned, Mundo, and the man whom he identified as the petitioner, were gone (R. 10).

Lobonc at the time of the aforesaid activities was watching a featherweight championship fight on the television in the rear of the tavern (R. 8).

Louis Sancya, another witness, was sitting at the bar next to the two men who allegedly passed the counterfeit bills. Mundo was sitting at the second stool from him. The other man who was with Mundo was sitting on a stool next to Sancya. He wore a light top coat and a hat (R. 31). Sancya did not identify the petitioner. He was asked by the police if he could recognize both of the men and he replied that he could only recognize one of them; this was Mundo. He could not recognize the man sitting next to him (R. 34, 35).

Another Government witness, Sam Mundo, testified that he was a cousin of the defendant, John Mundo, and loaned his 1946 two-door Plymouth automobile on occasions to John Mundo, which automobile bore license number 829-634 (R. 46, 47). This was the same license number appearing on the automobile that was used by John Mundo and his companion the night that the counterfeit bills were passed (R. 33).

The Petitioner denied that he was in the G. & S. Tavern on the night of March 17, 1950; he said that he was home on that night at 1032 North Dearborn Street. Neither on that night nor any other occasion he never passed any counterfeit money (R. 69, 70).

In arguing the case to the Jury, the Petitioner's attorney called their attention to the fact that the witness, Sam Mundo, has the same description as the petitioner. Both are five feet seven in height and Sam Mundo is the man who owned the automobile. Counsel argued that he fitted

the description of the man who accompanied John Mundo. Counsel argued further that there was no evidence that the officers ever asked the bartender, Lobonc, to look at somebody else except Battiato (R. 102, 103).

In his opening remarks to the Jury, the District Attorney said:

> "Take our witnesses, the reputation and the character of our witnesses, particularly Sancya and Lobonc. They had never seen the defendants before, and they have no ill will towards them. To them, they are just another individual. They would have no reason to lie; it would profit them nothing to lie. And take Louis Sancya; if he wanted to lie, he could have said, 'I saw both of them; I saw them at such and such a place.' But, mind you, Louis Sancya was the son of the owner; he was so careful in his identification that he stated, *'I only saw John Mundo. I can't identify Battiato; he had a hat on.'* "

Sancya, of course, did not testify that he couldn't identify Battiato, that Battiato had a hat on. All he said is that he couldn't identify the man who accompanied John Mundo.

In his closing argument to the jury, the Assistant District Attorney stated: "If I, in my own mind, thought for one minute that these defendants were not parties to this case, I certainly would not have the courage to stand up here and argue before you that they were guilty. It is never our intention to prosecute and try innocent men" (R. 105).

On another occasion, in his closing argument, the prosecuting attorney stated: "Then there was some mention made that Sam Mundo might look like, something like, Battiato here, and that we did not take Sam Mundo before Lobonc. So you know Lobonc was here all day yesterday, and they passed in the corridor, and they were in the witness room together, because they were both important witnesses, and now they are trying to raise the question of identifica-

tion because Lobonc did not see Sam Mundo. He was in the same witness room with him yesterday." An objection was made to those remarks, which was sustained by the Court.

The prosecuting attorney further argued: "Lobonc came on the witness stand and he, in my opinion, unqualifiedly, unquestionably, pointed out these two defendants, corroborated by the evidence of Sancya" (R. 110). The prosecution was in error, and grievously so, when he stated that the identification of Battiato by Lobonc was corroborated by the evidence of Sancya. Sancya testified that he was unable to recognize or identify Battiato (R. 34).

At the conclusion of the Court's instructions, counsel for Battiato requested an instruction to the jury that the prosecutor's remarks to the jury that he would not have brought the case if he did not believe in it personally, should be stricken and disregarded (R. 120). The Court, however, denied the request (R. 120).

Reasons for Allowance of the Writ

The Circuit Court of Appeals held that the prosecutor did not state that he had personal knowledge of any fact material to the isue. The Court further states:

> "This statement was far short of alleging that the speaker had personal knowledge of facts showing defendant's guilt. He does not state in uncompromising language or even hint that the defendants are guilty. He states merely that he is arguing that they are guilty and that he believes them guilty. Moreover, when the context from which the excerpt is taken is considered we believe it becomes perfectly plain that no improper argument was presented."

The prosecutor is not permitted to argue that *he* believes the defendant guilty; he can only argue the guilt of the defendants from the testimony and evidence and not from

his personal beliefs. When the prosecutor stated "It is never our intention to prosecute and try innocent men," he told the jury that it was the Government's only intention to prosecute and try guilty men. The statement of the prosecutor is to the effect that they had determined that the defendants were guilty before their trial. No other conclusion can be deduced from the remarks of the prosecutor.

On another occasion the prosecutor told the jury, in reply to defense counsel that Sam Mundo looked like Battiato, that Lobono and Sam Mundo passed each other in the corridor and were in the witness room together and, hence, if Lobono had recognized Sam Mundo on that occasion, he would have identified him in the court room.

The holding of the Court of Appeals is probably in conflict with applicable decisions of this Court and also in conflict with an opinion of the Circuit Court of Appeals for the Ninth Circuit.

In the case of *Berger* v. *United States,* 295 U. S. 78, 79 L. Ed. 1314, 55 S. Ct. 629, it appears that the prosecuting attorney, in arguing to the jury in the trial court, with reference to the testimony of a woman, stated that he was examining "a woman that I knew knew Berger and could identify him" (page 87, Official Report). The Supreme Court commented (page 88), "The jury was thus invited to conclude that the witness Goldstein knew Berger well but pretended otherwise; and that this was within the personal knowledge of the prosecuting attorney." On one or two other occasions the District Attorney misquoted the evidence, just as in the present case where the District Attorney told the jury that "Lobono came on the witness stand and he, in my opinion, unqualifiedly, unquestionably, pointed out these two defendants, *corroborated by the evidence of Sancya"* (R. 110). The actual fact is that Lobono's identification of Battiato was not corroborated by

Sancya. The United States Supreme Court held (page 88, Official Report):

"The United States Attorney is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligations to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done. As such, he is in a peculiar and very definite sense the servant of the law, the twofold aim of which is that guilt shall not escape or innocence suffer. He may prosecute with earnestness and vigor—indeed, he should do so. But, while he may strike hard blows, he is not at liberty to strike foul ones. It is as much his duty to refrain from improper methods calculated to produce a wrongful conviction as it is to use every legitimate means to bring about a just one.

"It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations, which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, especially, assertions of personal knowledge are apt to carry much weight against the accused when they should properly carry none. The court below said that the case against Berger was not strong; and from a careful examination of the record we agree. Indeed, the case against Berger, who was convicted only of conspiracy and not of any substantive offense as were the other defendants, we think may properly be characterized as weak—depending, as it did, upon the testimony of Katz, an accomplice with a long criminal record.

"In these circumstances prejudice to the cause of the accused is so highly probable that we are not justified in assuming its non-existence. If the case against Berger had been strong, or, as some courts have said, the evidence of his guilt 'overwhelming,' a different conclusion might be reached. Compare *Fitter* v. *United States*, 258 Fed. 567, 573; *Johnson* v. *United States*, 215 Fed. 679, 685; *People* v. *Malkin*, 250 N. Y. 185, 201-202,

164 N. E. 900; *Iowa* v. *Roscum,* 119 Iowa 330, 333, 93 N. W. 295. Moreover, we have not here a case where the misconduct of the prosecuting attorney was slight or confined to a single instance, but one where such misconduct was pronounced and persistent, with a probable cumulative effect upon the jury which cannot be disregarded as inconsequential. A new trial must be awarded. Compare *N. Y. Central R. Co.* v. *Johnson,* 279 U. S. 310, 316-318.

"The views we have expressed find support in many decisions, among which the following are good examples: *People* v. *Malkin, supra; People* v. *Esposito,* 224 N. Y. 370, 375-377, 121 N. E. 344; *Johnson* v. *United States, supra; Cook* v. *Commonwealth,* 86 Ky. 663, 665-667, 7 S. W. 155; *Gale* v. *People,* 26 Mich. 157; *People* v. *Wells,* 100 Cal. 459, 34 Pac. 1078. The case last cited is especially apposite."

In the case of *Taliaferro* v. *United States,* 47 F. (2d) 699, 701 (C. A. 9), a judgment of conviction was reversed and remanded for the sole reason that the prosecutor made a statement of fact on his own knowledge.

The defendant was charged with having unlawful possession and transportation of liquor. The defense argued that the liquor could not have stayed on the floor of an automobile. Some witnesses testified that they tested the floor of the automobile by pouring water on it which ran out immediately. There was no showing, however, that the floor of the car was in the same condition when they performed their tests, as it was the night of the arrest. The prosecutor argued that while the Prohibition Department had it, "We removed the floor boards to take out the battery and the floor was in a different condition then than upon the night of the arrest. *I know that of my own knowledge.*"

The Circuit Court of Appeals observed that the record shows a sharp conflict in the testimony as to the physical structure and condition of the automobile and stated:

"That being so, the prosecutor should not have made the above quoted statement. It was prejudicial, and the failure of the Court on motion to instruct the jury to disregard it calls for a reversal of the case" (p. 701). The Court continued further, referring to the prosecutor's argument:

> "It is equally their duty to see that one accused of crime is not prejudiced by the offer or introduction of incompetent evidence or by statements and argument not justified by the facts proved" (p. 701).

At page 702, the Court further stated:

> " 'Cases are to be decided by juries upon the evidence, and when the evidence is offered by witnesses, the witnesses are subject to cross examination. A defendant should not be subjected to a trial on the unsworn statements of an attorney conducting the prosecution, even when such statements are relevant to the case, for he would by this procedure be debarred the right of cross examination and be also deprived of the right of offering evidence in rebuttal. It is not within the legitimate province of counsel to state facts pertinent to the issue that are not in evidence; nor can he assume in argument that such facts are in the case when they are not.' *Lowdon* v. *United States,* 149 F. 673, 676 (C. C. A. 5th).
>
> " 'The district attorney had no right to make statements in argument based upon his own knowledge, or upon anything else that is not contained in the record. He should be as vigilant to see the prisoner protected from such statements as he is to see that the state is protected by an actual presentation of the evidence as it is in the record.' *Hamilton* v. *State,* 97 Tenn. 452, 37 S. W. 194, 195.
>
> " 'He has a right to comment on the manner, actions, and appearance of witnesses, but not to testify in his argument in the case, and present facts for the consideration of the jury not in evidence.' *State* v. *McGahan,* 48 W. Va. 438, 37 S. E. 573, 574.

" 'It is error for counsel * * * to state * * * his own knowledge of facts unless he has testified thereto as a witness, * * * or to insinuate that he has knowledge of facts which are calculated to prejudice the opposite party.' *Commonwealth* v. *Shoemaker*, 240 Pa. 255, 87 A. 648, 38 Cyc. 1496."

Conclusion

For the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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Of Counsel.

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In the Supreme Court of the United States

OCTOBER TERM, 1953

No. 189

MICHAEL BATTIATO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 122-125) is reported at 204 F. 2d 717.

JURISDICTION

The judgment of the Court of Appeals was entered May 22, 1953 (R. 126), and a petition for rehearing (R. 127-131) was denied June 19, 1953 (R. 131). The petition for a writ of certiorari was filed July 18, 1953. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTION PRESENTED

Whether petitioner was deprived of a fair trial by reason of allegedly prejudicial remarks of the prosecuting attorney.

STATEMENT

Following a trial by jury in the United States District Court for the Northern District of Indiana, petitioner was convicted (R. 2-3) on a two count indictment which charged that he knowingly and with intent to defraud passed a counterfeit twenty-dollar bill (count 2) and that he aided and abetted one John Mundo, his co-defendant, in passing another counterfeit twenty-dollar bill (count 1), in violation of 18 U.S.C. 472 (R. 1-2). He was sentenced to concurrent terms of imprisonment of four years on each count (R. 3). The conviction was affirmed on appeal (R. 126).

The evidence in support of the verdict may be summarized as follows:

On March 17, 1950, between 9:30 and 10 p.m. two male strangers, one wearing a gray suit and the other, a dark blue suit, entered the G & S Tavern, East Chicago, Illinois and sat at the bar near the door (R. 6-7). The man in the grey suit, subsequently identified by bartender Louis Lobonc, Jr., as John Mundo of Chicago (R. 6, 7, 28-29, 50) ordered "whiskey and a wash" for both men (R. 8), for which he gave Lobonc a counterfeit twenty-dollar bill (R. 41, 42-44). Lobonc took it without being aware of its character and gave the customer change (R. 8, 27). The man in the dark suit, later

identified by Lobonc as petitioner Michael Battiato of Chicago (R. 6, 9, 28-29, 69), ordered a second drink for both men (R. 9). He also gave Lobonc a counterfeit twenty-dollar bill (R. 41, 42-44). But when Lobonc looked at it and felt it, "it didn't feel very good". He looked at the bill under a bright light in a booth in the back of the tavern and called to the owner's son, Louis Sancya, who was sitting at the bar watching a television fight (R. 31, 32), to come over and look at it. (R. 9.) Sancya noticed that the bill "wasn't any good" and told Lobonc to return it to the customer (R. 10, 32). In the meantime, however, both customers had left (R. 10). Sancya then ran out the side door which opened into a parking space (R. 10, 32). He saw a car with two men in it but with no lights (R. 32) backing out toward him. When they pulled out ahead, the lights went on and Sancya observed from a distance of 20 to 30 feet the license number (R. 33), which he called out to Lobonc, who wrote it down (R. 10, 32). Subsequently, it was identified as the license number given to Sam Mundo,[1] John Mundo's cousin (R. 46, 48). The police were called and the counterfeit bills were given to them (R. 11).

The circumstances surrounding the allegedly improper remarks of Government counsel are as follows:

In his closing argument to the jury, Government counsel emphasized (R. 84):

---

[1] Sam Mundo testified that his car was parked behind his tavern in Calumet City, Illinois, between 9:00 and 12:00 on the evening of March 17 (R. 48).

> Now, the most important thing in this case is the evidence. It is not so much as to what I say, or what I think might have been said, or what the defense might say, or what they might think was said. It is what you heard from that witness stand; it is what is in evidence, the two bills, and the information relating to the license. Now, bearing that in mind, I am going to review this evidence * * *.

While Government counsel was reviewing the evidence and defense counsel objected to some of his conclusions, not relevant here, the judge overruled the objection saying (R. 86): "The jury will remember the evidence, and each counsel may argue what inferences can be drawn from the evidence." On another similar occasion, he said (R. 87): "The jury can recall the evidence * * *. Each counsel may state what he thinks the evidence is. If it is not correct, the jury will remember."

With respect to the identification of petitioner and his co-defendant, Sancya had testified that when petitioner and Mundo came into the tavern, they sat down about three stools away from him, that petitioner sat closer to him than Mundo, but that he was able to identify Mundo as one of the two men, but he could not identify the other (R. 31, 35). On this issue, Government counsel argued in closing that (R. 86) Louis Sancya "observed one of the men at the bar, the other one he was unable to say who it was," that (R. 89) if Louis Sancya "wanted to lie, he could have said, 'I saw both of them; I saw them at such and such a place.' But,

mind you, Louis Sancya was the son of the owner; he was so careful in his identification that he stated, 'I only saw John Mundo. I can't identify Battiato; he had a hat on'," that (R. 91) Lobonc "was positive that those men [petitioner and Mundo] were the men irrespective of what might be said, or done, and, after all, who should know better than he? After all, he saw them. And then that evidence is corroborated by Louis Sancya as to Mundo," and that (R. 110) "Lobonc came on the witness stand and he, in my opinion, unqualifiedly, unquestionably, pointed out these two defendants, corroborated by the evidence of Sancya."[2] In response to petitioner's counsel's closing argument that Lobonc was never confronted with and asked if he could identify Sam Mundo, whose car was used by the two men leaving the bar and who fit the same description attributed to petitioner (R. 102-103), Government counsel further argued (R. 109-110):

> Then there was some mention made that Sam Mundo might look like, something like, Battiato here, and that we did not take Sam Mundo before Lobonc. Do you know Lobonc was here all day yesterday, and do you know Sam Mundo was here all day yesterday, and they passed in the corridor, and they were in the witness room together, because they were both important witnesses, and now they are

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[2] Petitioner in his statement (Pet. 5), but not in his argument, claims that this sentence was inaccurate. However, Government counsel three times in his summation repeated that, whereas Lobonc identified both Mundo and Battiata, Sancya identified only Mundo (R. 86, 89, 91).

> trying to raise the question of identification because Lobonc did not see Sam Mundo. He was in the same witness room with him yesterday.

The court sustained an objection to this argument (R. 110).

At the conclusion of the Government's rebuttal, petitioner's counsel requested time for additional argument because of alleged misstatements made by the government (R. 110). The court denied the request on the ground that "the jury will remember the record" and "if any counsel has misinterpreted the evidence, that is a matter for the jury to decide" (R. 111).

The court instructed the jury at the outset as follows (R. 111):

> As I said earlier, you have the right and the duty to decide what the facts are. It is your exclusive province to decide what happened and whether an offense was committed, and who committed it, and whether or not these defendants were a part of what happened. * * *

Then, throughout the instructions, nine different times (R. 112-113, 115, 116, 117), the court reiterated to that jury that they should decide petitioner's guilt solely from a consideration of the evidence.

ARGUMENT

Petitioner's contention (Pet. 2, 5-10) that the prosecutor was guilty of prejudicial misconduct is based primarily on the following statement by the prosecutor in his address to the jury (R. 105):

> Mr. Keckich: I, for one, subscribe to the motto that "The Government wins when justice is done." If I, in my own mind, thought for one minute that these defendants were not parties to this case, I certainly would not have the courage to stand up here and argue before you that they were guilty. It is never our intention to prosecute and try innocent men. By the same token, it is our responsibility and duty, as a representative of the people and the Government, to see that justice is done and, when a grand jury returns an indictment, a grand jury of sixteen to twenty-three people, like you, that the case should be presented to a jury of twelve people to determine the man's innocence or guilt.

This remark was made directly in reply to defense counsel's argument (R. 104) that the prosecution was seeking an unjust conviction by his ambition to win.[3] Being charged with an improper motive by defense counsel, the prosecutor was certainly justified in defending himself as he did and making remarks which might otherwise be improper. See *Baker* v. *United States,* 115 F. 2d 533, 544 (C.A. 8), certiorari denied, 312 U.S. 692; *Malone* v. *United States,* 94 F. 2d 281, 288 (C.A. 7), certiorari denied, 304 U.S. 562; *Comeriato* v. *United States,* 58 F. 2d 557, 558 (C.A. 4); *Gridley*

[3] The defense counsel had just finished arguing (R. 104):

"Over the Department of Justice Building in Washington there is a large sign which says, 'The Government wins when justice is done.' It does not say, 'The Government wins when the prosecutor wins every case'; it does not say that. [It] says that 'The Government wins when justice is done'. * * *"

v. *United States,* 44 F. 2d 716, 739 (C.A. 6), certiorari denied, 283 U.S. 827.

Furthermore, unlike the statement in *Taliaferro* v. *United States,* 47 F. 2d 699 (C.A. 9), upon which petitioner relies (Pet. 8), counsel's remark was not an expression of personal knowledge of a disputed fact. It was merely a statement that the prosecutor believed that on the evidence petitioner was guilty. Such an expression is implicit in every prosecutor's closing argument urging that the defendant be convicted. Cf. *United States* v. *Holt,* 108 F. 2d 365, 369-370 (C.A. 7), certiorari denied, 309 U.S. 672; *Di Carlo* v. *United States,* 6 F. 2d 364, 368 (C.A. 2), certiorari denied, 268 U.S. 706; *Tuckerman* v. *United States,* 291 Fed. 958, 969 (C.A. 6), certiorari denied, 263 U.S. 716.

In sum, there is no basis for the claim that the prosecutor's conduct comes within the condemnation of this Court's decision in *Berger* v. *United States,* 295 U.S. 78. See also *Viereck* v. *United States,* 318 U.S. 236.[4]

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[4] There is no merit in petitioner's contention (Pet. 4-5) that the prosecutor's remark that Lobone saw Sam Mundo in the hall and in the witness room during the trial (*supra,* pp. 5-6) constituted reversible error. This remark was made in reply to defense counsel's observation in summation that Lobone was never asked to identify Sam Mundo who looked like petitioner. See *Baker* v. *United States, supra; Malone* v. *United States, supra.* Inasmuch as the court immediately sustained petitioner's objection to this remark, it could not have prejudiced him.

CONCLUSION

The decision below is correct and there is involved no conflict of decisions or question of general importance. We respectfully submit, therefore, that the petition for a writ of certiorari should be denied.

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OCTOBER 1953.

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